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No. 161

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

DORA SUROWITZ,
Individually and on behalf of all other similarly situated shareholders of HILTON HOTELS CORPORATION,
Petitioner,

vs.

HILTON HOTELS CORPORATION, a corporation, CONRAD N. HILTON, ROBERT P. WILLIFORD, ROBERT J. CAVERLY, JOSEPH P. BINNS, SPEARL ELLISON, HENRY CROWN, HORACE C. FLANIGAN, BERNO M. BECHHOLD, Y. FRANK FREEMAN, WILLARD W. KEITH, LAWRENCE STERN, SAM D. YOUNG, FRITZ B. BURNS, VERNON HERNDON, HERBERT C. BLUNCK, CHARLES L. FLETCHER, ROBERT A. GROVES, JOSEPH A. HARPER, BARRON HILTON AND HILTON CREDIT CORPORATION, a corporation,
Respondents.

Petition for Rehearing

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UNITED STATES LAW PRINTING CO., CHICAGO 38, ILL. LA Review 1-1881

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Respondents respectfully petition this Court to grant rehearing of this cause and thereafter to affirm the judgment of the District Court and the Court of Appeals.

The only issues on this appeal are (1) the interpretation of the verification requirement which Rule 23(b) imposes in all shareholder derivative actions, and (2) whether the verification filed in this case complied with the Rule as so interpreted.

Instead of determining these issues, the Court's Opinion erects and demolishes two straw men: first, that this is not a "strike suit," and second, that an affirmance would prevent any "unsophisticated shareholder" from bringing a derivative suit. Then, after discussing these points at length, but without the citation of a single precedent and without any analysis of the meaning of Rule 23(b), the Court finds for the petitioner. The Opinion of March 7, 1966 will inevitably be regarded by the lower courts, the Bar, and commentators as a judicial repeal of the Rule.

Respondents have grounded their arguments solely upon petitioner's failure to comply with Rule 23(b). Respondents have never contended that this action is a "strike suit". Yet the Court's Opinion considers this "issue" in depth and bases a decision for the petitioner on the determination that this is not a "strike suit." This determination has no relevance to the question whether the specific requirements of Rule 23(b) have been met.

The Opinion also adopts petitioner's straw man argument that the decision in this case will determine whether "ignorant and unsophisticated" shareholders can bring derivative actions, and that a decision for the petitioner is necessary to prevent respondents from escaping, because of a technicality, from serious charges. This argument represents a complete misunderstanding of the course and significance of the proceedings in the lower courts. It creates a dilemma for all judges called upon to determine the degree to which any Federal Rule of Civil Procedure must be obeyed.

Acceptance of the "unsophisticated shareholders" argument does a genuine injustice to the lower courts. Neither the Trial Judge nor the Court of Appeals dismissed this

action because petitioner was "ignorant and unsophisticated." The Findings of Fact and Conclusions of Law of the District Judge and the Opinion of the Court of Appeals reveal that this action was dismissed solely because of petitioner's failure to comply with the verification requirements of Rule 23(b).

The "ignorant shareholders" argument ultimately rests upon a contention that such shareholders cannot comply with Rule 23(b) as construed by the Court of Appeals, and that therefore this Court is forced either to (a) judicially repeal Rule 23(b) so as to uphold the verification in this case, or (b) deny legal redress for "unsophisticated" shareholders. This choice is not presented by either shareholders' actions in general or this action in particular.

The fallacy of petitioner's argument and of the Court's Opinion on this score lies in the assumption that only the plaintiff of record may verify. Respondents have consistently recognized that, in proper circumstances, a complaint may be verified by an agent or attorney on behalf of the party plaintiff. In any case in which an investigation has been made sufficient to bring a derivative action in good faith, there must be some person, be he plaintiff, agent or attorney, with sufficient knowledge of the facts to make a truthful verification. *No bona fide derivative action need be barred by the enforcement of Rule 23(b) as construed by the Opinion of the Court of Appeals.*

In this particular case both petitioner's son-in-law, Mr. Brilliant, and her counsel claimed in their affidavits to have sufficient knowledge or information to make a truthful

verification. The record demonstrates that the Trial Judge repeatedly suggested that the matter might be resolved by the filing of a substitute verification. (R. 175-6, 185) The failure of counsel to do this, in part because, as they conceded on oral argument, they wanted the issue of Mrs. Surowitz' verification resolved by this Court, merely underscores the fact that correction was available in this case. Thus the purported dilemma of the "ignorant and unsophisticated" shareholder is a wholly specious issue.

Furthermore, although emphasized in the Opinion as a threat to the beneficial purposes of the federal securities laws (Op. p. 10), enforcement of Rule 23(b) in this case could not possibly permit respondents to escape trial on the merits of the charges made in the petitioner's complaint. At page 11 of the Opinion it is stated:

> "It has now been practically three years since the complaint was filed and as yet not one of the defendants has ever been compelled to admit or deny the wrongdoings charged."

But, in fact, as respondents have pointed out (Resp. Br. 61):

> "A shareholder's derivative action complaining of the identical stock transactions referred to in the complaint in the case at bar is at issue and approaching trial in the Chancery Court of Delaware, *149 Fifth Ave. Corp.* v. *Bechhold, et al.,* Civil Action No. 1863."

The Delaware action is at issue by reason of an answer filed by the defendants there (respondents here) which denies each and every allegation of fact charging fraud, misrepresentation, concealment, or breach of fiduciary duty in the two transactions challenged by the petitioner here. The denials encompass every charge of wrongdoing made

in the complaint in the case at bar. Consequently, the Opinion, insofar as it suggests, after stating the petitioner's charges in detail, that respondents have been unwilling to admit or deny these charges, inadvertently misstates the facts. More important, insofar as the Opinion rests upon the assumption that there will be no trial on the merits of these charges unless petitioner wins this appeal, it is grounded upon a mistaken assumption.

Although deciding the two straw man arguments just discussed, the Court did not come to grips with the central and only issue decided below: the interpretation of the verification requirement of Rule 23(b). The only suggestion, in the Opinion, of an interpretation of the Rule which would characterize Mrs. Surowitz' affidavit as a proper verification rests upon an assumption that a verification may be made without any information or understanding, in blind faith upon the general assurances of another person. Thus, on page 7 of the Opinion, this Court recognizes that the lower courts correctly found that Mrs. Surowitz did not understand any of the legal relationships or business transactions in the complaint, and that she knew only:

> "that she had put over $2,000 of her hard earned money into Hilton Hotels stock, that she was not getting her dividends, and that her son-in-law had looked into the matter and had thought that something was wrong. She also knew that her son-in-law was qualified to help her and she trusted him."

If the foregoing is accepted as a sufficient basis for a truthful verification under Rule 23(b), that Rule has in fact been repealed. Such a verification is utterly inconsistent with the language of the verification actually drafted, signed and filed by the petitioner, which states

unequivocally that she is "familiar" with the allegations of the complaint, that she knows some of them to be true, and that she makes the others on information and belief.

While the Opinion states (p. 2) that the language of petitioner's verification was "in strict compliance with the provisions of Rule 23(b) * * *", the uncontroverted fact is that

> " . . . Mrs. Surowitz verified the complaint, not on the basis of her own knowledge and understanding, but in the faith that her son-in-law had correctly advised her that the statements in the complaint were either true or to the best of his knowledge *he* believed them to be true." (emphasis supplied) (Op. p. 7.)

Thus Mrs. Surowitz did not have either the knowledge or the information and belief to make *her* verification anything but sham. The Opinion, by accepting this sham, has raised form to power over substance, and has made a nullity of Rule 23(b).

Since the acceptance of such a verification *in effect* repeals Rule 23(b) *pro tanto*, it is not surprising that many members of the Bar and of the business community have treated the opinion as an explicit holding that a shareholder plaintiff need not comply with Rule 23(b) at all, unless defendants show that the action is a "strike suit." The discussion at pages 8-9 of the Opinion seems to suggest that, since the action was brought in good faith and on the basis of an investigation, and since "this is not a strike suit or anything akin to it," the action could not be dismissed, regardless of whether a truthful or a false verification had been filed. This interpretation of the Opinion was apparently adopted by the C.C.H. Federal Securities Law Reports, which summarized this Court's

Opinion in its March 9, 1966 Report Letter by stating, in part:

> "The United States Supreme Court has ruled that a stockholder may bring suit under the Federal Securities Law even though the verification requirements of Rule 23(b) of the Federal Rules of Civil Procedure were not met. . . . "

Certainly this Court is not bound by the interpretation given its Opinion by any commentator, nor can lower federal courts and attorneys accept blindly such interpretation. It is, however, respectfully suggested that the Opinion of March 7, 1966 lends itself to the interpretation quoted above. It is also respectfully suggested that, until repealed by appropriate action, the language of Rule 23(b) unambiguously requires a verification in all derivative actions, and provides no basis for an "interpretation" that the verification requirement is to be excused unless defendants affirmatively show that a plaintiff is acting in bad faith.

Respondents respectfully suggest that petitioner's verification can be upheld only through an overt or tacit judicial repeal of the provisions of Rule 23(b). If the Court is convinced of the wisdom of such repeal, it should be done only through the well-established rule-making processes and not by judicial decision. *United States* v. *Robinson*, 361 U.S. 220, 229 (1960); *United States* v. *Isthmian S.S. Co.*, 359 U.S. 314, 322-324 (1959); *Schlagenhauf* v. *Holder*, 379 U.S. 104, 112 (1964); *Miner* v. *Atlass*, 363 U.S. 641 (1960).

Even if repeal is to be effected by judicial decision, it should not be done in words that repudiate the lower courts' enforcement of the unambiguous language of Rule 23(b), and which charge those courts with preventing "unsophisticated litigants from ever having their day in court." (Op. p. 10.)

Respectfully submitted,

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STATE OF ILLINOIS)
COUNTY OF COOK) ss

Samuel W. Block, on oath, states that he is one of the counsel for Respondents, and that this Petition for Rehearing is presented in good faith and not for delay.

.....

Subscribed and sworn to
before me this ..... day
of March, 1966.

.....
Notary Public